Supreme Court, U. S.
FILED
JUL 23 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975

NO. 75-128

MARTIN MILLER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: July 24, 1975

MIAMI REVIEW — 371-4853 — 377-3721

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NO. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, MARTIN MILLER, prays that a Writ of Certiorari issue to review the judgment and opinion entered on June 24th, 1975, by the United States Court of Appeals for the Second Circuit in a proceeding entitled *United States of America, Plaintiff-Appellee, against Bertram L. Podell and Martin Miller, Defendants-Appellants,* Docket No. 75-1019.

Opinion Below

The judgment and opinion of the Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at page 1a, of the Petition of Martin Miller.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on June 24th, 1975. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

Whether the Circuit Court of Appeals erred in not applying the *Santobello* rule where the Government was found to have breached a promise concerning sentence recommendation?

Whether the Circuit Court of Appeals erred in not applying the *McCarthy* rule where the Petitioner's plea of guilty did not conform to the requirements of Rule 11 of the Federal Rules of Criminal Procedure?

Statutory Provisions Involved

Rule 32(d) of the Federal Rules of Criminal Procedure states as follows:

> "(d) Withdrawal of Plea of Guilty. A Motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest in-

justice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Rule 11 of the Federal Rules of Criminal Procedure states as follows:

> "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Statement of the Case

On his plea of guilty, Petitioner MARTIN MILLER, was convicted in the United States District Court for the Southern District of New York of conspiracy to violate the Federal Conflict of Interest Statute, Title 18, United States Code, Section 203, in violation of Title 18, United States Code, Section 371. The indictment in the case arose out of Podell's appearance before various Federal agencies, while a member of the House of Representatives, on behalf of Florida-Atlantic Airlines, a now defunct corporation which was owned by Petitioner, MARTIN MILLER. The theory of the Government's case was that Podell was

compensated for these appearances by fees paid to Podell's law firm by Florida Atlantic Airlines and by a political contribution for Podell's re-election campaign paid directly by MARTIN MILLER.

Prior to sentence, Petitioner moved in the District Court pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure for an order allowing him to withdraw his plea of guilty. This motion was grounded upon an allegation that certain essential promises made by the Government during plea negotiations had been breached, when, on the eve of sentence, a Government attorney recommended that Miller be sentenced to jail.[1]

The Petitioner's motion alleged that:

> "Insofar as representations and promises made to the defendant, Martin Miller, are concerned, both your deponent and Mr. Miller were told on a number of occasions by Mr. Giuliani and by Mr. Jaffe that it was the position of the United States Attorney's office not to recommend a specific sentence. Both further stated on numerous occasions that they would recommend to the Court neither a suspended sentence nor, on the contrary would they recommend that the defendant receive a specific jail sentence." (A 62-63)[2]

In response to Petitioner's claim in the District Court, the Government asserted that the letter in question was not a recommendation that Miller be sentenced to jail. (A 78-79) The Trial Court dismissed this argument out-of-hand and stated that:

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[1]This letter appears in the Circuit Court's opinion on page 4369-70.

[2]The letter "A" refers to Petitioners' joint Appendix on file in the United States Court of Appeals for the Second Circuit.

"I think the letter is a recommendation for a jail sentence and I think if you did make such a promise, the question is whether or not only that you violated it, but what effect that had." (A 79)

After testimony taken at an evidentiary hearing, the Court made a finding of fact that the Government had indeed made a representation to Miller and that the letter was "in essence . . . a violation of the spirit, if not the letter of agreement" (A 180); however, the District Court concluded that "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do, so he had no choice, once Podell pleaded." (A 181)

In affirming the District Court, the Circuit Court held:

"The district court's finding that Miller pleaded guilty because Podell had done so, and not because of prosecution promises, is also not clearly erroneous. Miller was charged with conspiring with Podell and with making illegal payments to him. Once Podell pleaded guilty to accepting those payments, the Government could have called him as a most effective witness against Miller. Furthermore, Miller had made statements before the Grand Jury incriminating both himself and Podell. Once Podell had pleaded guilty, the Government was no longer prohibited by *Bruton v. United States*, 391 U.S. 123 (1968) from introducing those statements against Miller. Finally, like Podell, Miller specifically denied that he was pleading in response to pressure or promises. Under these circumstances, we hold that Miller's plea did not rest

"in any significant degree" on the Government's promise not to recommend a jail sentence."

Petitioner herein contends that the conclusion reached by both the District Court and the Circuit Court of Appeals is unsupported in the record and results from a serious misreading of this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971).

This Court in the *Santobello* case ruled that:

> "When a plea rests in *any* significant degree on a promise or agreement of the prosecutor, so that it can be said to be *part* of the inducement or consideration, such promise must be fulfilled." (Emphasis added)

In the case at bar, the District Judge made a finding of fact that the promise to abstain from a recommendation on sentence was made and then that agreement was breached. The Trial Court ruled that:

> "I think I have announced already my position on the letter, the government's letter of January 2, court's exhibit 1, is a recommendation that prison be imposed. Otherwise, the letter makes no sense at all to me.
>
> "The government does not recommend a specific prison term and argues this letter does not violate a representation. While that may be technically correct, I view the letter in essence as a violation of the spirit, if not the letter of the agreement." (A 180)

In denying Petitioner's motion, however, the Court concluded that the representations or promises made by the prosecutor were not a material or significant part of the plea in that the Petitioner had no other choice.

Petitioner MARTIN MILLER respectfully submits that his petition deserves separate and distinct consideration apart from that of Petitioner BERTRAM L. PODELL. It is submitted that the Circuit Court may not have had difficulty in resolving the *Santobello* issue insofar as Podell was concerned, due to the fact that testimony clearly indicated that Podell's principle reason for the entry of a guilty plea was to preserve his right to practice law. It is clear that the promise not to request a jail sentence was secondary in the Podell plea.

On the other hand, and quite to the contrary, Petitioner MILLER'S position was simply that he did not wish to go to jail. Mr. Miller's testimony was exactly to that issue and no other. (A 141) The District Court and the Circuit Court drew factual conclusions totally unsupported by the record in a strained effort to sustain the guilty plea.

It should be borne in mind that the guilty plea of Miller was entered prior to his testifying at trial and both the Trial Judge and the Appellate Court did not have the opportunity to know what his testimony would be. If, in fact, Miller had no choice, it is puzzling as to why the Government accepted the plea on one count of conspiracy while insisting on two counts from Podell. It is obvious from the record in this cause that the only reason that the Petitioner's plea was entered was to avoid the imposition of a jail sentence.

As to Petitioner MILLER, the Government further promised that they would "go to bat" for him at time of sentencing due to his cooperation before the Grand Jury. The Government did, in fact, apprise the Court of Petitioner MILLER'S cooperation in the last paragraph of its letter to the District Court. However, it was the Petitioner's position that the severity and tenor of the first portion of the Government's letter was so inconsistent as to negate the last paragraph of the Government's letter with regard to the Petitioner's cooperation.

The District Court upheld the Petitioner's position in that it made no distinction as to the effect of the Government's recommendation on Podell and Miller, in that the Court found that the letter was "a violation of the spirit if not the letter of the agreement" as to both Podell and Miller. (A 180)

Again, this court held in *Santobello*, that when a defendant enters a plea, which rests in *any* significant degree on a promise of the prosecutor so that it is *part* of the inducement to enter such plea, then the promise must be fulfilled or the defendant be allowed to plea anew. (Emphasis added)

It is, therefore, submitted that the ruling of the Circuit Court is completely inconsistent with this Court's decision in *Santobello v. New York, supra.*

The Petitioner also seeks review of the Circuit Court's ruling with regard to the trial court's compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

This Court held in *McCarthy v. United States*, 394 U.S. 459 (1969) and in *Santobello v. New York, supra* that Rule 11 of the Federal Rules of Criminal Procedure required the Trial Court to establish on the record at the time of the plea of guilty that there is a factual basis for the defendant's plea and that it was knowingly entered with an understanding of the charge.

As the record indicates, Petitioner MILLER pleaded guilty to the charge of conspiracy to violate the Conflict of Interest Statute and to defraud the United States of America. Petitioner did not plead guilty to the substantive charge of Conflict of Interest as did his co-defendant.

It is the Petitioner's contention that it is evident from the colloquy in the District Court at the time the appellant entered his plea, that the charge of conspiracy was not understood and that it was not knowingly entered.

Upon questioning from the Bench, the Petitioner stated that although he retained Podell for his influence, *he had no knowledge that he was violating the laws of the United States at the time of the transaction.* (A 48-49) (Emphasis supplied)

However, the Circuit Court held:

> "... the District Court ascertained at the time the pleas were entered, the defendants were well-educated and could be *assumed* to be aware of what had transpired at trial. Under these circumstances, it is frivolous to argue that the pleas should be set aside because the Judge failed to outline in detail the

> necessary elements of the charge, all of which were amply established in the Trial Record." (Emphasis supplied)

While it is conceded that Podell is a lawyer, the Petitioner herein is a layman and this Court requires that Rule 11 of the Federal Rules of Criminal Procedure be strictly complied with.

> "... because a guilty plea is an admission of all the elements of a Federal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." (*McCarthy, supra*)

The record is clear that the Petitioner MILLER did not understand the charge of conspiracy and that he did not knowingly enter a plea to such charge, in that the Federal crime of conspiracy requires proof of an intent, actual or implied, to violate a Federal law. *United States v. Garafola*, 471 F.2d 291 (6th Cir. 1972); *United States v. DeMarco*, 488 F.2d 828 (2d Cir. 1973).

Accordingly it is submitted that the Circuit Court's ruling is in direct conflict with this Court's ruling in *Santobello v. New York* and *McCarthy v. United States* (*supra*).

Upon the foregoing, it is respectfully submitted that certiorari should be granted the Petitioner MARTIN MILLER.

CONCLUSION

Based upon the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: July 24, 1975

Respectfully Submitted,

RICHARD B. MARX
Attorney for Petitioner
MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing Petition for Writ of Certiorari was served upon the Honorable Paul J. Curran, United States Attorney, for the Southern District of New York at One San Andrews Plaza, New York, New York, on ____ day of July, 1975.

_____

Counsel for Respondent

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 866, 875—September Term, 1974.
(Argued April 21, 1975 Decided June 24, 1975.)
Docket Nos. 75-1019, 75-1030

UNITED STATES OF AMERICA,

Appellee,

v.

BERTRAM L. PODELL and MARTIN MILLER,

Appellants.

Before:

HAYS, MULLIGAN and TIMBERS,

Circuit Judges.

Appeal from judgments of conviction of the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, and the denial of motions under Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw guilty pleas.

JAMES M. LA ROSSA, New York, N.Y. (La Rossa, Shargel & Fischetti, New York, N.Y., on the brief, Gerald L. Shargel, of counsel), *for Appellant Podell*

RICHARD B. MARX, Miami, Fla. (Marx and Squitero, Miami, Fla., on the brief), *for Appellant Miller.*

RUDOLPH W. GIULIANI, Assistant United States Attorney Paul J. Curran, United States Attorney for the Southern District of New York, New York, N.Y., on the brief, Michael B. Mukasey, Joseph Jaffe, and Lawrence S. Feld, Assistant United States Attorneys, of counsel), *for Appellee*..

HAYS, *Circuit Judge:*

Bertram L. Podell and Martin Miller appeal from judgments of conviction in the United States District Court for the Southern District of New York and from the denial of their motions under Rule 32(d) of the Federal Rules of Criminal Procedure to withdraw pleas of guilty. Podell and Miller both pleaded guilty to conspiracy to defraud the United States and to violate the conflict of interest statute, 18, U.S.C. § 203 (1970).[1] Podell also pleaded guilty

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[1]Section 203 provides, in part:

"(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by hamslf or another—

(1) at a time when he is a Member of Congress, Member of Congress Elect, Delegate from the District of Columbia, Delegate Elect from the District of Columbia, Resident Commissioner, or Resident Commissioner Elect; or

(2) at a time when he is an officer or employee of the United States in the executive, legislative or judicial branch of the Government, or in any agency of the United States, including the District of Columbia,

in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

to a substantive violation of 18 U.S.C. § 203(a). We affirm.

I.

Congressman Bertram Podell was charged with conspiracy, the solicitation and acceptance of bribes, criminal conflict of interest, and perjury. Martin Miller was charged with conspiracy, with offering a bribe, and with offering compensation in violation of the conflict of interest statute.[2] At the trial the Government introduced evidence that while Podell was a member of Congress, he received from Miller over $41,000 in legal fees and campaign contributions in return for advocating the interests of Florida Atlantic Airlines before the Civil Aeronautics Board, the Federal Aviation Administration, the State Department, and the Government of the Bahama Islands. Evidence was also introduced that Podell had made false statements to the F.B.I. in the course of its investigation of his activities and that he lied under oath to the Grand Jury.

On the tenth day of the trial, Podell and Miller withdrew their pleas of not guilty. Both pleaded guilty to conspiracy to defraud the United States and to violate the conflict of interest law; Podell also pleaded guilty to accepting compensation in violation of the conflict of inter-

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"b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers, any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Delegate, Commissioner, officer, or employee—

Shall be fined not more than $10,000 or imprisoned for not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States."

[2]Herbert S. Podell, Bertram Podell's brother, was also indicted for conspiracy, bribery, the acceptance of compensation in violation of 18 U.S.C. § 203 (a), and the making of false statements in violation of 18 U.S.C. § 1001. His case was severed before trial.

est law. Podell had already been on the stand for a day and a half, and was scheduled to take the stand again for continued cross-examination when the guilty pleas were entered.

Before accepting the new pleas, Judge Carter asked the defendants if they were pleading guilty voluntarily. Both Podell and Miller stated that there had been no coercion by the Government or promises by their counsel to induce them to plead guilty. Podell stated that while a member of Congress, he had been indirectly compensated for appearing before federal agencies to advocate the interests of Florida Atlantic Airlines. He said that he had not intended to violate the law but did intend to do what he did. Miller stated that he had retained Congressman Podell for his influence and that while he did not knowingly violate the law, he did act intentionally. Counsel for Podell and for the Government made it clear that the defendants were pleading guilty to conspiring only to defraud the United States and to violate the conflict of interest laws, not to pay a bribe, as had been charged in the original indictment.

Podell and Miller later moved to vacate their pleas of guilty. At the evidentiary hearing held by Judge Carter, counsel for Podell stated that his client's primary purpose in pleading guilty had been to retain his license to practice law in New York. However, counsel also claimed that Podell had consented to plead guilty on the assurance of the prosecutors that they would not recommend a jail sentence and that Assistant United States Attorney Giuliana would testify on Podell's behalf in future disbarment proceedings that the offense of which he was convicted did not involve bribery or reflect a "corrupt and criminal intent." Counsel argued that both these assurances had been violated by a letter sent to the court on January 2,

1975. In that letter,[3] Assistant United States Attorney Mukasey pointed out that seriousness of the crimes to which the defendants had pleaded guilty. He also raised the problem of "treating less seriously the crimes of the privileged and powerful than those of the less advantaged." He expressed the opinion that the court's sentence should reflect the seriousness of the defendants' crimes. Counsel claimed that the letter constituted a recommendation of

[3]The letter read as follows:

"Dear Judge Carter:

"Your Honor presided over the trial of this case and is certainly aware of the serious nature of the crimes committed by both these defendants. At the time of sentence the Government will set forth in more detail its arguments concerning the seriousness of these offenses. As Your Honor knows, pursuant to the policy of this office and our agreement with Judge Frankel, we do not recommend specific sentences unless requested by the Court in advance. However, there are several matters which we would like the Court to consider prior to the sentencing proceeding.

"Bertram L. Podell held a high position of public trust. By his plea of guilty to two Federal felonies, he admitted that he violated that trust by using the influence of his public office to earn large sums of money for himself as a partner in the firm of Podell and Podell and as the sole beneficiary of the sums expended by the Citizens Committee for the Re-Election of Bertram L. Podell. Podell pleaded guilty to conspiracy to defraud the United States and a substantive violation of conflict of interest statutes. Both of these are serious violations of Federal Law and should be treated seriously at the time of sentence. Similarly, Martin Miller was a knowing and willing buyer of Podell's influence to benefit his airline.

"Obviously, sentences serve many purposes but in cases such as these the prime purposes are deterrence and the equal administration of the law.

"The crimes involved in this case are 'victimless' only in the sense that there can be no complaining witness to bring them to the attention of the authorities. When both parties to a corrupt bargain, such as Podell and Miller, are satisfied, the public interest can often be compromised without detection. It is therefore particularly important that others who may be tempted to enter into such corrupt bargains be deterred.

"Moreover, the criminal justice system has often been criticized for treating less seriously the crimes of the privileged and powerful

imprisonment and that it undermined Giuliani usefulness as a witness. Counsel for Miller also claimed that he had received an assurance that no jail sentence would be recommended and that the letter of January 2 had violated it.

The Government claimed that all it had promised was that it would follow its usual procedure of taking no position as to whether a specific jail sentence should be imposed and that Mr. Giuliani would testify that Podell had not pleaded guilty to bribery, as the record indicates. The Government's position was that the letter in no way violated these assurances.

After witnesses were called for both sides, the district judge found that the letter of January 2 violated "the spirit, if not the letter" of the Government's representation that it would not recommend a jail sentence. However, he also found that in pleading guilty, neither Podell nor Miller had relied to any substantial degree on the Government's representations. Podell had pleaded guilty "prin-

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than those of the less advantaged. The crimes in this case, involving the betrayal of public trust, are serious ones. We believe the Court's sentence should reflect that seriousness.

"Further, as Podell's plea showed, many of his statements to the FBI, to a grand jury in this District, and ultimately from the witness stand, were false. This history of lying under oath is one the Court is fully entitled to consider in imposing punishment.

"Obviously, Podell's political career does include substantial public service, much of which is no dobut being brought to the Court's attention. Such service is the very content of a political career. However, the power that Podell had to do good as a Congressman makes all the more serious his abuse of that power.

"Finally, the Court should also be aware that although Martin Miller elected after being indicted to stand trial, he did provide valuable information to the Government during the investigation that preceded the indictment. Miller testified before a grand jury in this District to the payments he made to Podell in return for Podell's use of Congressional influence in his behalf. That substantial cooperation should be weighed by the Court in Miller's favor in sentencing him."

cipally and primarily and exclusively because he was concerned that the jury might find him guilty of the bribery count" leading to his automatic disbarment. Miller pleaded guilty because "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do." The district judge therefore denied the defense motions to withdraw the guilty pleas. He sentenced Podell to two years imprisonment on the conspiracy count, all but six months suspended, and fined him $5,000 on the conflict of interest count. Miller was sentenced to two years imprisonment, all but six months suspended, and fined $10,000 on the conspiracy count.

II.

Appellants claim that under *Santobello v. New York*, 404 U.S. 257 (1971), the district court should have granted their motions to withdraw their guilty pleas on the ground that the Government violated its promise not to recommend a jail sentence. *Santobello* holds that

> "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262.

It is uncontroverted that Podell's main purpose in pleading guilty was to avoid a conviction for bribery and automatic disbarment. The district judge found that his plea rested "principally and primarily and exclusively" on that basis. Considering that Podell specifally denied that he was pleading in response to pressure or promises, we hold that the court's finding was not clearly erroneous. Podell's guilty plea must therefore stand since it rested in no significant degree on the Government's promises.[4] See *United States v. Lombardozzi*, 467 F.2d 160, 163 (2d Cir. 1972),

[4]Podell argues that even if his motive for pleading guilty was solely to avoid disbarment, the January 2 letter nevertheless warrants withdrawal of the plea because it violated Giuliani's promise to testify on

cert. denied, 409 U.S. 1108 (1973); *United States v. Lombardozzi*, 436 F.2d 878, 880-81 (2d Cir.), cert. denied, 402 U.S. 908 (1971).

The district court's finding that Miller pleaded guilty because Podell had done so, and not because of prosecution promises, is also not clearly erroneous. Miller was charged with conspiring with Podell and with making illegal payments to him. Once Podell pleaded guilty to accepting those payments, the Government could have called him as a most effective witness against Miller. Furthermore, Miller had made statements before the Grand Jury incriminating both himself and Podell. Once Podell had pleaded guilty, the Government was no longer prohibited by *Bruton v. United States*, 391 U.S. 123 (1968) from introducing those statements against Miller. Finally, like Podell, Miller specifically denied that he was pleading in response to pressure or promises. Under these circumstances, we hold that Miller's plea did not rest "in any significant degree" on the Government's promise not to recommend a jail sentence.[5]

With regard to the conspiracy count only, appellants argue that under *McCarthy v. United States*, 394 U.S. 459

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his behalf for the specific purpose of saving his license. The district judge did not specifically determine if Giuliani's promise was to testify that Podell had not acted with a corrupt intent, in which case the letter would effectively contradict the promised testimony, or if the promise was merely to testify that bribery was not involved in the conviction, which was still possible despite the letter. However, Judge Carter did find that Podell's plea was not motivated by any assurances from the Government but rather exclusively by the fear that the jury might convict him of bribery, leading to automatic disbarment. Whatever Giuliani promised, the exclusive purpose of Podell's plea, to avoid automatic disbarment, was accomplished by excluding the bribery elements from his conviction.

[5]The letter of January 2 did mention Miller's cooperation with the Grand Judy and asked the court to weigh that in his favor in sentencing him. It is therefore highly questionable if the district court's finding that the letter violated the Government's promise can be applied to Miller. Indeed, the Government argues that the letter did not even

(1969) and *Irizarry v. United States*, 508 F.2d 960 (2d Cir. 1974), they should be permitted to withdraw their guilty pleas on the ground that the district court accepted those pleas in violation of Rule 11 of the Federal Rules of Criminal Procedure.[6] Specifically, they claim that there was an insufficient factual basis in the record for the pleas and that the district judge failed to ascertain whether they understood the nature of the conspiracy charge. We find both of these contentions devoid of merit.

In *McCarthy v. United States*, supra, the Supreme Court held that a guilty plea which was entered in violation of Rule 11 should be set aside. The Court further held that in order to satisfy Rule 11, the district judge must personally address the defendant to determine if he understands the nature of the charge and must develop on the record the factual basis for the plea. 394 U.S. at 464-67; *Rizzo v. United States*, Docket No. 74-2523, slip op. at 3598 (2d Cir., May 19, 1975); *Irizarry v. United States*, 508 F.2d 960, 964, 967 (2d Cir. 1974); *Manley v. United States*, 432 F.2d 1241, 1244 (2d Cir. 1970) (en banc). In *Irizarry*, we put special emphasis on the need to explain the various elements of a conspiracy charge because of its unusual com-

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violate the promise to Podell since it did not recommend a specific jail sentence. However, in view of our holding that the promises were not a significant factor in the pleas of either Miller or Podell, we need not reach the issue of whether they were in fact breached.

[6] Rule 11 provides as follows:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

plexity. See 508 F.2d at 964-66. However, in each of those cases, a guilty plea was entered before trial. In this case, appellants pleaded guilty after the Government's entire case had been presented at trial and while Podell was being cross-examined. In addition, as the district court ascertained at the time the pleas were entered, the defendants were well-educated and could be assumed to be aware of what had transpired at the trial. Under these circumstances, it is frivolous to argue that the pleas should be set aside because the judge failed to outline in detail the necessary elements of the charge, all of which were amply established in the trial record.

It is equally frivolous to argue that these guilty pleas may be withdrawn because the record of the proceedings accompanying their entry failed to establish a factual basis for them. *McCarthy* requires that the factual basis for the plea appear in the record to protect a defendant from voluntarily pleading guilty to charges of which he is innocent. See 394 U.S. at 467. In this case, the record of the trial, at which appellants were represented by counsel and at which Judge Carter presided, together with the court's questioning at the time the pleas were entered, was surely sufficient to satisfy the court that there was a firm factual basis for the pleas.[7] See Fed.R.Crim.P.11.

Affirmed.

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[7]Appellants argue that there was no factual basis for their pleas to the conspiracy charge because both of them specifically stated at the time their pleas were entered that they had not acted with knowledge that they were breaking the law. However, the district judge could clearly have inferred from the trial record that they had acted with such knowledge. Furthermore, since knowledge of illegality is not necessary for a substantive conviction under 18 U.S.C. § 203, see *United States* v. *Quinn*, 141 F.Supp 622, 627 (S.D.N.Y. 1956), such knowledge is also not necessary for a conspiracy conviction. See *United States* v. *Feola*, 43 U.S.L.W. 4404, 4409-10 (U.S., March 19, 1975); *United States* v. *Mauro*, 501 F.2d 45, 51 (2d Cir. 1974), cert. denied, 419 U.S. 969 (1974).

Supreme Court, U. S.
FILED
OCT 9 1975
MICHAEL RODAK, JR., CLERK

Nos. 75-126 and 75-128

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERTRAM L. PODELL, PETITIONER

v.

UNITED STATES OF AMERICA

MARTIN MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-126

BERTRAM L. PODELL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 75-128

MARTIN MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Podell Pet. App.; Miller Pet. App.) is reported at 519 F.2d 1440.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1975. The petitions for a writ of certiorari were filed on July 23, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners should have been permitted to withdraw their guilty pleas on the basis of their assertions that the government breached certain provisions of its plea agreements with them.
2. Whether the trial court failed to satisfy the requirements of Rule 11 of the Federal Rules of Criminal Procedure in accepting petitioner Miller's guilty plea.

STATEMENT

Petitioners were charged in an indictment returned in the United States District Court for the Southern District of New York with conspiracy to defraud the United States and to solicit or receive bribes and improper compensation (Count I) and conspiracy to defraud the United States, to obstruct justice, and to give false statements (Count VII), in violation of 18 U.S.C. 201, 203, 371, 1001, 1503, 1510 and 1623. In addition, petitioner Podell was charged with hav-

ing received and solicited bribes (Counts II and III) and improper compensation (Count V) and having made false statements (Counts IX and X), in violation of 18 U.S.C. 2, 201(c), 203(a), 1001 and 1623. Petitioner Miller was also charged with having offered a bribe and improper compensation (Counts IV and VI), in violation of 18 U.S.C. 201(b) and 203(b).[1]

At petitioners' trial, the government introduced evidence tending to show that while Podell was a member of Congress he received approximately $41,000 in legal fees and campaign contributions from Miller in return for appearing before several federal agencies on behalf of Florida Atlantic Airlines. Evidence was also introduced establishing that Podell had made false statements to agents of the F.B.I. concerning his relationship with Miller and Florida Atlantic Airlines and that he had lied under oath to the grand jury (Miller Pet. App. 3).

On the tenth day of trial, after the government had completed its case-in-chief and during a recess in Podell's cross-examination, Podell offered to plead guilty to that portion of Count I of the indictment charging him with having conspired to defraud the United States and to receive improper compensation and to Count V, which charged him with having received improper compensation (Tr. 1428). In re-

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[1] Count VIII of the indictment charged petitioner Podell's brother, Herbert S. Podell, with having made false statements, in violation of 18 U.S.C. 1001. Herbert Podell's case was severed from petitioners' prior to trial (Miller Pet. App. 3, n.2).

sponse to questions put to him by the court, Podell —an attorney and congressman—stated that he was pleading guilty voluntarily, that his plea was not the result of coercion by the government or promises made to him by his own counsel and that he had fully discussed his plea with counsel (Tr. 1429-1430). The court advised Podell that by pleading guilty he waived his right to trial on the charges against him (Tr. 1429-1433). Podell explained the factual basis of his plea as follows (Tr. 1430-1431):

> If the Court pleases, while a member of Congress and acting as a lawyer for Florida Atlantic Airlines and paid by Leasing Consultants, Inc., I appeared before various federal agencies, including the CAB, the FAA, and advocated the interests of the said Florida Atlantic Airlines.
>
> I was indirectly compensated through my law firm for these appearances before the CAB and the FAA while a member of Congress.
>
> I did not at the time know that I was violating any law, but I intended to do what I did.

The court then accepted Podell's plea, after having ascertained that he was aware of the maximum sentence that could be imposed as a result of the plea (Tr. 1431-1433).

After the court had accepted Podell's plea, petitioner Miller also offered to plead guilty to that portion of Count I charging him with having conspired to defraud the United States and to receive or solicit improper compensation (Tr. 1433-1434). Miller also assured the court that he was pleading guilty of his

own free will, without any pressures or threats from the government or promises from his attorney. He also stated that he understood that by pleading guilty he waived his right to trial on the charges against him and that he was aware of the maximum penalty that could be imposed as a result of the plea (Tr. 1434-1435). Miller then outlined the factual basis of his plea as follows (Tr. 1435-1436):

> Your Honor, Congressman Podell was introduced to me as a congressman-attorney by Melvin Heiko. I, on behalf of Leasing Consultants, Inc. retained him for his influence. At the time I had no knowledge that I violated any of the laws of the United States. I understand now that I did.

The court also accepted Miller's plea (Tr. 1436). The remaining counts against petitioners were dismissed.

A week before petitioners were to be sentenced, Assistant United States Attorney Michael Mukasey informed the sentencing court by letter that, pursuant to the policy of the United States Attorney's Office and an agreement with the Chief Judge of the Southern District of New York, the government would not recommend any specific sentences for petitioners. However, Mukasey asked the court to consider a number of factors when imposing sentence: the seriousness of the crimes to which petitioners had pleaded guilty, the need for deterrence, the importance of equal administration of the law, and petitioner Podell's persistent lying under oath. Mukasey concluded the letter by suggesting that in imposing sen-

tence on petitioner Miller, the court should consider his truthful testimony before a federal grand jury concerning his illegal payments to petitioner Podell. The letter did not explicitly recommend imprisonment or any other specific sentence.[2]

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[2] The text of the letter was as follows (Miller Pet. App. 5-6 n. 3):

> Your Honor presided over the trial of this case and is certainly aware of the serious nature of the crimes committed by both these defendants. At the time of sentence the Government will set forth in more detail its arguments concerning the seriousness of these offenses. As Your Honor knows, pursuant to the policy of this office and our agreement with Judge Frankel, we do not recommend specific sentences unless requested by the Court in advance. However, there are several matters which we would like the Court to consider prior to the sentencing proceeding.
>
> Bertram L. Podell held a high position of public trust. By his plea of guilty to two Federal felonies, he admitted that he violated that trust by using the influence of his public office to earn large sums of money for himself as a partner in the firm of Podell and Podell and as the sole beneficiary of the sums expended by the Citizens Committee for the Re-Election of Bertram L. Podell. Podell pleaded guilty to conspiracy to defraud the United States and a substantive violation of conflict of interest statutes. Both of these are serious violations of Federal Law and should be treated seriously at the time of sentence. Similarly, Martin Miller was a knowing and willing buyer of Podell's influence to benefit his airline.
>
> Obviously, sentences serve many purposes but in cases such as these the prime purposes are deterrence and the equal administration of the law.
>
> The crimes involved in this case are "victimless" only in the sense that there can be no complaining witness to bring them to the attention of the authorities. When both parties to a corrupt bargain, such as Podell and

On January 9, 1975, petitioners moved to withdraw their guilty pleas, asserting that the government's letter violated certain provisions of its plea bargains with them. After an evidentiary hearing, the district court denied the motions. The court sentenced petitioner Podell to two years' imprisonment, all but six months of which was suspended, and fined him $5,000. Petitioner Miller was sentenced to two years' impri-

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Miller, are satisfied, the public interest can often be compromised without detection. It is therefore particularly important that others who may be tempted to enter into such corrupt bargains be deterred.

Moreover, the criminal justice system has often been criticized for treating less seriously the crimes of the privileged and powerful than those of the less advantaged. The crimes in this case, involving the betrayal of public trust, are serious ones. We believe the Court's sentence should reflect that seriousness.

Further, as Podell's plea showed, many of his statements to the FBI, to a grand jury in this District, and ultimately from the witness stand, were false. This history of lying under oath is one the Court is fully entitled to consider in imposing punishment.

Obviously, Podell's political career does include substantial public service, much of which is no doubt being brought to the Court's attention. Such service is the very content of a political career. However, the power that Podell had to do good as a Congressman makes all the more serious his abuse of that power.

Finally, the Court should also be aware that although Martin Miller elected after being indicted to stand trial, he did provide valuable information to the Government during the investigation that preceded the indictment. Miller testified before a grand jury in this District to the payments he made to Podell in return for Podell's use of Congressional influence in his behalf. That substantial cooperation should be weighed by the Court in Miller's favor in sentencing him.

sonment, all but six months of which was suspended, and fined $10,000 (Hr. 141).[3] The court of appeals affirmed (Podell Pet. App.; Miller Pet. App.).

ARGUMENT

1. Petitioners contend (Podell Pet. 3; Miller Pet. 6-7) that the letter sent to the court by AUSA Mukasey violated the promise that had been made to them that the government would not recommend their imprisonment if they pleaded guilty. Petitioner Podell separately contends (Pet. 4) that the letter violated AUSA Rudolph Giuliani's promise that he would appear before a bar association disciplinary proceeding and testify that Podell's conviction did not involve bribery and did not reflect a "corrupt and criminal intent." Petitioner Miller also claims (Pet. 8) that the letter violated a government promise to "go to bat" for him at sentencing.

At the hearing on petitioners' motions to withdraw their guilty pleas, AUSA Giuliani acknowledged that he had promised to testify at a bar association disciplinary proceeding that petitioner Podell had not pleaded guilty to conspiracy to commit bribery (Hr. 39-49). Giuliani also acknowledged informing defense counsel of the general policy followed by the United States Attorney's Office in the Southern District of New York of not recommending any specific sentence

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[3] "Hr." refers to the transcript of the hearing held in connection with petitioners' motions to withdraw their guilty pleas.

unless requested to do so by the court. But Giuliani and AUSA Joseph Jaffe, who had participated with Giuliani in the plea negotiations involving petitioners, also stated that they had informed defense counsel that at sentencing the government would make a statement concerning the facts of the cases against petitioners and the seriousness of the crimes to which petitioners had pleaded guilty, and that the government's position at sentencing was not a subject for negotiation (Hr. 37-39, 47, 49-50, 91, 93-94, 97, 108-110). Indeed, petitioner Podell's trial counsel admitted that during plea negotiations AUSA Giuliani had rejected "out of hand" his suggestion that the government not oppose a suspended sentence for Podell and that Giuliani reserved the right "to submit the facts to the Judge" at the time of sentence (Hr. 57).

The district court found that the plea agreement between the government and petitioners included a promise that the government would not recommend petitioners' imprisonment and that AUSA Mukasey's letter violated "the spirit, if not the letter of the agreement" (Hr. 116). The district court also found, however, that neither Podell nor Miller had relied to any significant extent on the government's representations concerning sentencing when they decided to plead guilty (Hr. 116-117). The court found that Podell's decision to plead guilty stemmed from a desire on his part to avoid a bribery conviction, which would have resulted in his automatic disbarment (Hr. 116-117). Miller's decision to plead guilty was, ac-

cording to the court, an almost inescapable consequence of Podell's guilty plea. Once Podell had pleaded guilty, he became available to testify against Miller, and Miller's statements to the grand jury, which incriminated both him and Podell, were no longer inadmissible under *Bruton* v. *United States*, 391 U.S. 123. As the district court stated, "once Mr. Podell pleaded guilty, Mr. Miller had nothing else to do" (Hr. 117).

Since petitioners' guilty pleas did not rest to any significant degree on any promises that may have been made to them on behalf of the government, the district court properly denied their motions to withdraw their pleas. See *Santobello* v. *New York*, 404 U.S. 257, 262; *United States* v. *Lombardozzi*, 467 F.2d 160, 163 (C.A. 2), certiorari denied, 409 U.S. 1108; *United States* v. *Lombardozzi*, 436 F.2d 878, 880-881 (C.A. 2), certiorari denied, 402 U.S. 908.[4]

2. Petitioner Miller also contends (Pet. 8-10) that the district court accepted his guilty plea without satisfying the requirements of Rule 11 of the Federal Rules of Criminal Procedure. More specifically, Miller contends that the court failed to establish on the record, as required by Rule 11, that Miller

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[4] Since the court of appeals agreed with the district court that petitioners had not pleaded guilty because of any representations made on behalf of the government, it did not reach the issue of whether the government breached its plea agreements with them (Miller Pet. App. 8-9, n. 5). We believe that the district court erred in finding that the letter sent to the court by AUSA Mukasey violated "the spirit, if not the letter" of the agreements, but agree that that issue need not be resolved on the facts of these cases.

understood the nature of the conspiracy charge to which he was pleading guilty. This contention is also without merit.

Although the court did not explain the conspiracy charge to which Miller offered to plead guilty immediately preceding acceptance of his plea, such an explanation was not required given the events that had preceded Miller's decision to change his plea. Before Miller stated that he wished to plead guilty, he had heard the court explain the elements of the conspiracy charge to the jury (Tr. 6-7). Thereafter, he had heard the government, in its opening statement, inform the jury that the conspiracy charge encompassed petitioner Podell's efforts to use his influence on behalf of Florida Atlantic Airlines in return for payments by Miller (Tr. 12-13, 17-18, 30). Miller had also listened to evidence introduced during the government's case-in-chief that tended to establish that while Podell was a congressman, Miller had paid Podell approximately $41,000 in legal fees and campaign contributions in order to influence proceedings before several federal agencies involving Florida Atlantic Airlines. As the court of appeals held (Miller Pet. App. 10), "Under these circumstances, it is frivolous to argue that the pleas should be set aside because the judge failed to outline in detail the necessary elements of the charge, all of which were amply established in the trial record."[5]

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[5] Petitioner Miller asserts (Pet. 9) that his lack of understanding of the conspiracy charge to which he pleaded guilty is shown by his statement upon tendering his guilty plea

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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that when he committed the acts in question he was not aware that he was acting illegally. As the court of appeals pointed out (Miller Pet. App. 10, n. 7), however, knowledge of illegality was not an element of the conspiracy charged in the indictment. See *United States* v. *Feola*, 420 U.S. 671; *United States* v. *Quinn*, 141 F. Supp. 622 (S.D. N.Y.).

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